

Navigating the Brownfield Cleanup Program from pre-application to acceptance

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Application, acceptance and remediation of a site through New York State's Brownfield Cleanup Program (BCP) conveys a significant financial benefit to recoup site preparation and tangible property costs via refundable tax credits. Moreover, by remediating a site under the oversight of the New York State Department of Environmental Conservation (DEC), a BCP site applicant could receive an important liability waiver from potential claims relating to cleaning up contamination from past disposals.

Building on our initial BCP article from September 2025, which highlighted the benefits provided to a project applicant accepted into the program, here we offer tips on how to best position a project in the pre-application and application stages. Projects that are set up well at the application stage may substantially shorten the overall timeline from submittal to acceptance into the BCP.

VOLUNTEER OR PARTICIPANT

To start, an applicant may enter the BCP either as a participant or a volunteer. In general, a participant owned the site at the time of disposal or caused the contamination. Meanwhile, a volunteer's liability arises solely by virtue of its current ownership but is not otherwise responsible for remediating the site. When a project reaches the remediation stage, a participant's responsibility may extend off-site to adjacent parcels that are impacted by

the project site's source of contamination. Beginning on September 1, 2026, as part of a BCP application, DEC now requires all applicants who seek to enter the BCP as a volunteer to certify that they have exercised appropriate care with respect to the contamination found at the site and provide a detailed description of an applicant's eligibility for volunteer status.

PRE-APPLICATION MEETING – GET DEC'S INITIAL TAKE

DEC allows a prospective applicant to submit a Pre-Application Worksheet and arrange for a meeting with the DEC regional staff. This process is intended to inform the applicant with DEC's initial impression as to whether the applicant's investigations have adequately justified program acceptance. Before the pre-application meeting, it is encouraged that an applicant submit a sampling matrix, sampling locations and resulting exceedances. An applicant may also provide copies of supporting environmental reports – namely, a Phase I and Phase II Environmental Site Assessment (ESA).

Because testing and investigation at this stage occur before a site's acceptance into the BCP, investigative costs incurred in preparation for BCP acceptance generally are not eligible for tax credits. Therefore, developers need to be strategic in reaching the goal of obtaining sufficient data without ballooning sampling costs at the front end.

ENOUGH, BUT NOT TOO MUCH

- Review Sanborn maps – A typical tool at the outset is to commission a Phase I ESA, which involves a review of historical records, including the Sanborn Fire Insurance Maps and aerial photographs. Sanborn maps may indicate historic uses both onsite and on adjacent sites, such as fuel stations, auto repair uses, dry-cleaners, printing, fire department training locations, or other industrial activities that may have caused or contributed to present contamination at the site.
- Analyze aerials & tank history – Historic records and aerial photographs may reveal above-ground or underground bulk storage tanks that were previously registered and/or historically present. Historic records may also show the presence of septic tanks utilized to discharge wastewater.
- Test pits vs. borings – Armed with information from past records, an applicant may develop a strategic plan as to where to test for potential contamination, and which test method is the most effective. Test pits and trenching allow for direct visual identification of the soil's conditions, potentially leading to more targeted sampling than borings, which drill in one narrow area, generally three quarters of an inch to six inches in width. For the BCP, applicants

should do a combination of both, while giving preference to test pits in the most likely areas. Also consider targeted groundwater sampling in situations where onsite or adjacent upstream uses may have impacted groundwater and the water level is close to the surface.

APPLICATION – DO THE WORK FOR DEC

The ideal application provides a narrative of the site and the area's history and walks DEC through the locations of contamination found in initial sampling. The application narrative should dive into the Phase I and Phase II ESA and any additional sampling, provide details that explain the location, testing parameters, and exceedances on-site, and note the potential impact to the surrounding environment, the groundwater and the public. While costs incurred at this period are not eligible for tax credits, a skimpy or sloppy application will likely delay DEC approval and in some instances could impact eligibility for the program. Upfront investment can reduce project development costs and delays over the long term.

- Determine site boundary; avoid amendments – If a project is considering acquiring additional contiguous lots, one strategic idea is to make those decisions before submitting the BCP application. Once the site enters the BCP, and depending on the acreage, adding additional lots typically requires an amendment to a brownfield agreement, which can cause delays.
- Describe and don't attach – Applicants that simply attach and reference voluminous Phase I or Phase II ESAs will likely receive a Notice of Incomplete Application from DEC, asking the applicant to

answer specific questions. This back-and-forth could delay the BCP acceptance timeline and delay the beginning date when costs become eligible for tax credits.

- Pinpoint the contamination and potential contaminant source – Similarly, the BCP application requires that the contamination location be identified as well as potential contaminant source areas. The investigation should make connections between the present contamination and past uses.
- To RIWP or not to RIWP – Applicants must make a choice to submit the Remedial Investigation Work Plan (RIWP) with the application or wait. The difference is time. When submitted together, the project has one 45-day public comment period. If separately submitted, two comment periods result.

THE PROGRAM FEE AND FEE WAIVER ELIGIBILITY

The New York State Legislature, in its 2022 BCP Program amendments, added a \$50,000 program entrance fee as well as the ability to seek a fee waiver. Applicants seeking a waiver must demonstrate "financial hardship" and basically meet a but-for test, showing that the site's remediation would be infeasible without the waiver. Despite initial qualms by many that the program fee would reduce BCP applications, DEC reported in May 2025 that applications are still trending up. Phillips Lytle advised on the very first BCP project to receive a fee waiver in NYS. Since that time, DEC has developed some informal, informative guidelines on what project type tends to successfully prove financial hardship.

- 100% affordable housing – Affordable housing projects that contain any percentage of market-rate housing have not been

successful in obtaining the fee waiver. DEC views this market-rate housing as a factor that will make the remediation feasible, along with making the very-low or low-income housing feasible.

- Retail primarily serves residents – A 100% affordable housing project that contains a retail component can still successfully receive a fee waiver with a showing of financial hardship, particularly if the retail component is designed to primarily serve the residents or the project is in a service dead zone.
- Submit fee waivers with the application – DEC requires applicants to submit fee waiver requests along with the application. At acceptance into the program, the chance to submit a fee waiver is lost.

Ultimately, at all stages in the BCP application, detailed, high-quality documents expedite the process to receive an approval from DEC.

To learn more about the program, stay tuned for our next article, where we will discuss ways to expedite getting from application to a Certificate of Completion, post Certificate of Completion considerations, and and maximizing tax credits along the way.

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